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Countering the Unfair Play of DRM Technologies

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COUNTERING THE UNFAIR PLAY OF DRM TECHNOLOGIES

Nicola Lucchi*

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Abstract: In the rapidly expanding information society, intellectual property law plays an increasingly important role in the production, distribution and use of creative material. As a consequence, it faces new possibilities and challenges. One of the most troublesome is connected with the development of the Digital Rights Management Systems and Technological Protection Measures applied to control the distribution and use of electronic works.

In this framework, the anti-circumvention provisions enacted at the American, European and international level to safeguard digital content from uncontrolled distribution and unlawful use could have perverse effects and serious implications for the consumer community. When these provisions are applied and embedded to media products, they can erode some fundamental rights of consumers and can restrict traditional usages. This paper analyzes whether and to what extent the consumer rights are negatively affected by “digital terms and conditions” enforced with technology and contract law. To balance this inequity the research speculates on the application of consumer protection law as a possible contributory instrument to reduce imbalance between parties.

Introduction

This paper focuses on the side effects for consumers and the possible solutions connected with the diffusion of Digital Rights Management Systems (DRMs) used to secure digital content and also to manage individual users’ behavior.

These kind of technological fences underlie a very large number of attractive and innovative services for consumers such as online music and video stores, pay-per-view and video on demand services. DRMs can be applied for many purposes and in different ways, some of which could be beneficial or detrimental for consumers depending on specific circumstances. DRM systems have offered new distribution and pricing models that take advantage of new
technologies.

Unfortunately, some digital content formats have embedded capabilities to limit the ways in which digital content can be used reducing the consumer’s choice and generating interoperability problems. Use may be restricted, for example, for a time period, to a particular computer or other hardware device, or may require a password or an active network connection. Furthermore DRM can also individually control users’ behavior presenting a powerful threat to freedom of expression as well as privacy. Such situations can conflict with legitimate consumer rights and privileges.

Because consumers have the right to benefit from technological innovations without abusive restrictions, I suggest considering consumer protection law as an effective and immediately usable solution to reduce some of the imbalances between parties.

To solve this unfairness, we could assume different approaches. The question could be addressed (not necessarily solved) by using three different contexts: copyright law, competition law and consumer protection law.

In this article I only use the consumer protection law perspective. The following pages consider whether and to what extent the consumer rights are negatively affected by “digital terms and
conditions” enforced with technology and contract law. To balance this inequity the research speculates on the application of consumer protection law as a possible contributory instrument to achieve more fairness in mass-market digital product transaction.

The first part of the article, after a brief definition of the term “DRM”, offers three concrete example of the potentially side effects of the use of Digital Rights Management technologies in consumer products.

The second part discusses how control of information, essentially based on contract, technology and copyright law, has been reshaped by digital revolution putting aside the law and promoting contract and technology. In this troublesome situation the article offers a route to reconcile conflicting privileges.

The third part looks at the European and the U.S. consumer protection provisions, confronting the U.S. state law doctrine of unconscionability, European consumer protection law and other traditional limitations on contractual rights.

The article concludes proposing some possible scenarios and the features suggested by these scenarios. In particular it invites to reconsider the setting of copyright law and to stipulate new rules for the implementation of specific provisions regarding digital consumer
protection. In the meantime, general consumer protection law could contribute to filling the gap, even if it can not be considered a complete cure.

1. DRM Technologies: definition and functioning
Digital Rights Management (DRM) is a broad term that refers to any technologies and tools which have been specifically developed for managing digital rights or information. DRM technologies have the potential to control access to and use of digital content.


objective is usually realized by implementing a technological protection measure. Then, a technological measure is any technology that is designed to prevent or restrict acts which are not authorized by the right-holder.\(^3\)

The synergic effect obtained through the combination of technical and legal means of protection allows DRMs to create a business model for the secure distribution of digital content to authorized users.\(^4\)

In practice, DRM systems are software-based tools tailored to set the use of digital files in order to protect the interests of right-holders. DRM technologies can manage file access (number of views, length of views, ways of viewing), altering, sharing, copying, printing, and saving.\(^5\) These technologies may be included within the operating system, program software, or in the actual hardware of a device.


To secure content, DRM systems can take two approaches: “The first is ‘containment’ or the wrapper, an approach where the content is encrypted in a shell so that it can only be accessed by authorized users. The second is ‘marking’ or using an encrypted header, such as the practice of placing a watermark, flag, XML or XrML tag on content as a signal to a device that the media is copy protected.”

DRM systems can be characterized by the different technological protection measure used. Encryption is one of the basic features. It keeps content secure by scrambling (or “encrypting”) it and preventing from being read until it is unscrambled with the appropriate decryption key. Digital watermarking is another technique used to authenticate, validate, and communicate information. It enables identification of the source, author, creator, owner, distributor, or authorized consumer of digital content. Another type of protection measure is constituted by “trusted systems.” These systems strengthen content protection, involving both software and hardware in the control process by building

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6 Id.

security features like cryptographic signatures in personal computers.8

2. Side Effects Induced by DRM Technologies: Some Practical Cases

Three concrete examples of the effects of the use of DRM technologies in consumer products help to better understand the underlying problems and potential strategies to restore the traditional balance. I outline some courts decisions connected with cases where consumers never received the correct information concerning the limitation imposed thought the use of DRMs.

2.1 iTunes

The first is the case of iTunes Music Store, a famous virtual record shop where customers can buy and download either complete albums or individual tracks from many major artists of different genres.9

This service enforces its standard contract terms by means of a DRM system called “FairPlay” and, according to the terms of


9 See Apple’s iTunes Music Store, http://www.apple.com/itunes/store/ (last visited Jan. 11, 2007). Online services are present also outside the United States and Europe with over 40 services.
service, the provider reserves the right, at its sole discretion, to modify, replace or revise the terms of use of the downloaded files.\textsuperscript{10}

Apple reserves the right, at any time and from time to time, to update, revise, supplement, and otherwise modify this Agreement and to impose new or additional rules, policies, terms, or conditions on your use of the Service. Such updates, revisions, supplements, modifications, and additional rules, policies, terms, and conditions (collectively referred to in this Agreement as "Additional Terms") will be effective immediately and incorporated into this Agreement. Your continued use of the iTunes Music Store following will be deemed to constitute your acceptance of any and all such Additional Terms. All Additional Terms are hereby incorporated into this Agreement by this reference.\textsuperscript{11}

This kind of unilaterally imposed changes in conditions of use on legitimate downloaded files can be enforced just by changing the DRM settings. In the EC market, this behavior is prohibited by law and considered unfair, in particular when applied in a standard form contract not subject to negotiation. According to the Directive


93/13/EEC on unfair terms in consumer contracts,\(^{12}\) the case could be included in the indicative and non-exhaustive list of the terms which may be regarded as unfair, reproduced in the Annex to the Directive.\(^ {13}\) Explicitly, the Directive talks about terms which have the object or effect of “enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract”\(^ {14}\) or of “enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided”.\(^ {15}\)

Based also on this fact, on 25th January 2006 the Norwegian Consumer Council presented a complain with the Consumer Ombudsman (Mr. Bjørn Erik Thon) against iTunes Music Store Norge for breach of fundamental consumer rights.\(^ {16}\) Although


Norway is just an EEA (European Economic Area) member its copyright and consumer protection law fully complies with the EC Copyright and Consumer Acquis.

Mr. Thon has ruled that some of the Apple iTunes terms and conditions are in contrast to section 9a of the Norwegian Marketing Control Act.\(^\text{17}\) This act implements in the Norwegian systems the Directive 93/13/CE on unfair terms in consumer contract. Section 9a stipulates that:

Terms and conditions which are applied or are intended to be applied in the conduct of business with consumers can be prohibited if the terms and conditions are considered unfair on consumers and if general considerations call for such a prohibition. When determining whether the terms and conditions of a contract are unfair, emphasis shall be placed on the balance between the rights and obligations of the parties and on whether the contractual relationship is clearly defined or not.

According to this act, the Consumer Ombudsman, upon request from an authority or consumer organizations, can intervene and prohibit the use of unfair terms and conditions in consumer contracts.18

In this case, Mr. Thon has considered as unreasonable some of iTunes terms and conditions. In particular, he has considered unfair, among other provisions, Apple's reservation of the right to unilaterally modify the terms of the usage agreement without notice and its disclaimer of responsibility for computer viruses or other damage that might result from downloading music from its service. Both terms violate the basic fundamental principles of contract law. Furthermore the Norwegian Consumer Ombudsman highlighted that Apple’s DRM system is not "interoperable" with other formats and devices “locking consumers into Apple’s proprietary systems.”

This decision, even if the case is still pending, is one of the several small steps on a long path, but it could be considered a very

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significant step. In fact, it is important to note that Norway's complaint comes after similar recent case law in Europe.

2.2 Sony-BMG rootkit

This example confirms that consumer protection in digital media could be found outside copyright law. The case is connected to the use of a copy-protection technology called XCP (i.e. Extended Copyright Protection) in the Sony-BMG CDs. When consumers

19 Id., at 566-567 (admitting that, even if consumer authorithies can protect only consumer, the case could have a pan-European consequence since European consumer protection law are wide harmonized).

20 Apple is facing legal action on several fronts. Sweden and Denmark Consumer Authorities are considering to follow the Norway's judgment. On a different front, iTunes seems to have some problems about the lack of interoperability. See e.g. Conseil de la Concurrence, Décision N° 04-D-54 du 9 Novembre 2004 relative à des pratiques mises en œuvre par la société Apple Computer, Inc. dans les secteurs du téléchargement de musique sur Internet et des baladeurs numériques, available at http://www.conseil-concurrence.fr/pdf/avis/04d54.pdf.

tried to play the copy protected CDs on their computers, this DRM system automatically installed software and then hides this software to make it more difficult for consumers to remove it. The side effect of this software was to interfere with the normal way in which the Microsoft Windows operating system plays CDs, opening security holes that allow viruses to break in. It was also able to collect information from the user's computer. Even if Sony BMG disclosed the existence of this software in the EULA, the agreement does not disclose the real nature of the software being installed, the security and privacy risks it can create, the practical impossibility of uninstalling and many other potential problems for the user's computer. On the contrary EULA misrepresents the real nature of the software including ambiguous and restrictive conditions.

When users and consumer organizations were seized of the matter, they filed more than twenty lawsuits against Sony BMG in Canada, the United States and Europe.\textsuperscript{22}

Following the discovery of the use of this surreptitious copy protection technology, in November 2005, the Attorney General of Texas filed a class action lawsuit against Sony-BMG\textsuperscript{23} under Texas’ Consumer Protection Against Computer Spyware Act of 2005 ("Texas Spyware Act").\textsuperscript{24} In the United States, other private actions


\textsuperscript{24} Tex. Bus. & Com. Code, § 48.001 et seq. The statute sets up the crimes for the following conducts: (1) unauthorized collection or culling of personally identifiable information; (2) unauthorized access to or modifications of computer settings; (3) unauthorized interference with installation or disabling of computer software; (4) inducement of computer user to install unnecessary
were consolidated and settled.\textsuperscript{25} Many of these class-action lawsuits were filed in California by Electronic Frontier Foundation asserting the violation California's Consumer Protection Against Computer Spyware Act.\textsuperscript{26}

The point is particularly interesting for the article’s thesis because, to my knowledge, these are some of the first cases based on consumer law as an instrument of defense against DRM technologies. Actually, the US approach to the problem has been mainly examined, at least up to now, under the copyright spectrum.\textsuperscript{27}

software; and (5) copying and execution of software to a computer with deceptive intent. It also allows civil remedies.


2.3 EMI Music France
The last example is the French case CLCV v. EMI Music France. The consumer association *Consommation, Logement et Cadre de Vie* (CLCV) filed a lawsuit claiming that EMI Music France had not provided sufficient and correct information to consumers concerning technological protected CDs and their playability restrictions. In particular the judge of the Court of First Instance considered that not informing consumers about the fact that a content medium like a CD cannot be played on some devices can represent a «tromperie sur les qualités substantielles des CD», that is a deception on substantial qualities of CD.\(^\text{28}\) For this reason it can constitute a misleading behavior about the nature and substantial qualities of the product as recognized by the article L213-1 of the French Consumer law (*Code de la Consommation*)\(^\text{29}\). The Court of appeal in Versailles confirmed


\(^{29}\) Article L213-1 Code de la Consommation (*Loi n° 92-1336 du 16 décembre 1992 art. 322 Journal Officiel du 23 décembre 1992 en vigueur le 1er mars 1994*): “Sera puni d'un emprisonnement de deux ans au plus et d'une amende de 250 000 F au plus ou de l'une de ces deux peines seulement quiconque, qu'il soit ou non partie au contrat, aura trompé ou tenté de tromper le contractant,
the decision of the Tribunal de Grande Instance de Nanterre, rejecting the arguments of EMI Music France. It also ordered EMI Music to pay 3000 Euro as damages and to appropriately label the outside packaging of its products.30

3. DRM Technologies, Contract and Consumer Protection

These three examples offer clear evidence that contemporary transnational economy is often in contrast with national legal orders, which are unable to rapidly conform to the changes of the society.

They also prove that Copyright Law is drifting away from its leading role because is inadequate to deal effectively with the challenges of the new global environment. On the contrary, contract has been able to adapt to the changes in society produced by the
industrial revolution as well as in the present-day potential of the
digital world. This is the reason why contract has become the
principal instrument for legal innovation and legal standardization.

In the information society framework, the combination of contract
with technological protection measures could represent a powerful
mixture for a fully automated system of secure distribution, rights
management, monitoring, and payment for protected content. So,
when users access content protected by a technological protection
measure, the content provider, in practice, imposes a contractual
provision by a click-through or click-wrap agreement. In particular,
in the online media marketplace, digital rights management systems
can operate in combination with contracts and can be essentially used
to enforce contractual conditions.

31 See George W. Goble, *The Nature of Private Contract*, 14 STAN. L. REV. 631,
634 (1962) (book review) (noting how contract has become the most seasoned
and effective law).

32 See FRANCESCO GALGANO, *LA GLOBALIZZAZIONE NELLO SPECCHIO DEL
DIRITTO* 93-94 (2005); On the relationship between Legal and Technical
Standardization see Margaret J. Radin, *Online Standardization and the
The flow and control of information is essentially based on the following instruments: contract, technology and copyright law. The digital revolution has reshaped the hierarchy by putting aside the law and promoting contract and technology. Copyright law has just become an instrument to strengthen the control based on contract and technology.

Actually, the anti-circumvention legislations, enacted in the United States and Europe, combined with the use of technological protection measures and rights management systems have had the effect to move the issue from copyright law to contract law. As a consequence, if digital content is protected by rights management


34 See generally LAURENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).


systems, and rights management systems are protected by technological and legal measures, consumer’s capacity to exercise legitimate rights or exceptions could be compromised. Content owners can unilaterally determine and dictate terms and conditions limiting consumers’ behaviors.

Furthermore, in the digital marketplace, consumers are increasingly obliged to deal with unfair and obscure licensing agreements, misuse of personal data, device and digital content which are not designed to communicate together and, above all, with lack or insufficient information about products and services.37

To balance this iniquity I want to concentrate on the aspects of consumer protection, fair contractual conditions, information disclosure and deceptive practices. DRM-controlled applications have the potential to formulate rules38 and to enforce contractual


38 The so called “normative effect of technology”. On the power of technology, see generally LESSIG, supra note 34; Joel R. Reidenberg, Lex informatica: The
conditions\textsuperscript{39} locking content beyond its copyright period or disrespecting existing exceptions, such as the “right” to make copies for private use, parody, quotation, scientific or teaching purposes.\textsuperscript{40}

Additionally, a DRM enforced contract is often realized on unfairness in the process of contract formation and on unfairness in the “invisible” contract terms connected with the use of technological protection measures. Whereas “visible” terms are immediately valuable by consumers, “invisible” terms and conditions are, not only terms that cannot be readily comprehended, but, in this case, they are also terms implemented without providing consumers notice of the possible limitations of the copy-protected content. In few words, the restrictions imposed by technological measures are

\textsuperscript{39} See extensively Lucie M.C.R. Guibault, Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright (2002).

\textsuperscript{40} See Andrea Ottolia & Dan Wielsch, Mapping the Information Environment: Legal Aspects of Modularization and Digitization, 6 Yale J. L. & Tech. 174, (2003) (arguing that a contract or a license might be provided and signed by the user while acquiring the DRM).
frequently unclear to consumers. This lack of information can induce consumers to take buying decisions which they would not have taken had they been better informed.

The perverse effect of this technology controlled contract is to preclude the traditional copyright balance between right-holders’ interests on the one hand and the interest of users and society on the other hand. This is a traditional balance that has been a part of Anglo-American fair use doctrine as well as of the copyright exemptions in European copyright law.

Therefore, to avoid a legal regime that reduces options and competition in how consumers enjoy digital media, contractual licensing of information or other standardized digital content transactions must be subject to the same legal limitations as other contracts. The aim is to guarantee consumers certain basic rights also in the digital world informing what they can or cannot do with the digital content acquired.

Copyright Law is drifting towards a contract law scheme where DRM Technologies allow copyright owners to circumvent the existing fair use exceptions in the Copyright Law. So, any “rights” that consumers may have under copyright law could be replaced by a commercial agreement between the parties. I consider that these
stronger author rights need stronger balancing factors.

To reach this goal I think it is necessary to develop a new legal framework to reestablish consumers' rights. In the meantime we can immediately achieve some good results applying general consumer protection law and in particular the legal remedies to protect the weaker contractual party.

4. Do Consumers have rights when purchasing digital content?

Digital Consumers have rights, which must be protected.

The development of digital media technology has offered new opportunities of enjoyment for consumers\(^{41}\), but they also raise, as above-mentioned, significant consumer protection concerns. Various media system available on the market use DRM technologies without any consideration about the effects such means will have on customers.

Obviously, consumers have certain basic rights also in the digital world. Legislation and other rules of conduct designed to protect consumers from deceptive marketing practices, negligent misrepresentations, unfair terms or unfair business practices apply with their full force. Moreover, consumers must be able to judge the quality and characteristics of some complex technological products and services. There is no doubt that disclosure and transparency are effective means of protecting their rights and interests, especially in case of information asymmetry.

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For example, consumers must know what they can do with their digital hardware and content as well as the limit of their usage. These rights and duties have always lain at the heart of consumer politics.

These rights are different depending on the type of contract used. Thus, a content transaction could be identified as a license or a sale, but the controversial nature of the distinction between a license and a sale, when applied to the technology world, could make this doctrinal dispute more confusing. The main difference is that in the first case...

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46 See Raymond T. Nimmer, Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2, 35 WM. & MARY L. REV. 1337, 1345-46 (1994) (discussing distinctions between sales of tangible goods and licenses of...
the content transaction falls under contract law while in the second it falls under copyright law.\textsuperscript{47} Vendors, usually, prefer license agreements because they allow to avoid the first sale or the exhaustion right, imposing terms and limitations on consumer’s use.\textsuperscript{48} It is clear that this conduct virtually results in determining the landscape of consumer privileges. These privileges are recognized and protected by law, but are often restricted by the use of DRM technologies. The issue is directly related to cases in which the contract scheme is shaped not as the consequence of negotiation between parties, but rather as a form of imposition of unilaterally defined contractual terms and conditions. In this case the licensor is effectively using the contract, the license, to manage his rights never considering the possibility that others do have rights.

\textsuperscript{47} See ROSENBLATT ET AL., \textit{supra} note 1, at 48 (arguing that the tension between copyright and contract law affects the balance that copyright law seeks to strike).

As discussed later in the paper, there is a controversy about the value and the consequence of this common practice. We have just to decide if consumers could be protected using the umbrella of consumer protection law or rather reconsidering the setting of copyright law. Then, in case of lack of information, it is necessary to decide the preferred solution: provide the missing information or regulate the market directly.

Under the first point of view, we must consider that pro-digital-consumer legislation has enjoyed no great success in U.S.. The most famous consumer-rights legislation proposed in the recent time, the Digital Media Consumers' Rights Act ("DMCRA"), 49 has been reintroduced into Congress three times without success.

On the contrary, in France, Norway, and Germany several pieces of pro-consumer legislation have been recently proposed or introduced. The fact that such legislation has been supported is

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significant in a number of respects. The recent Apple DRM-free music proposal is somehow related to this new European approach.\(^5\)

Thus, it could be reasonable to limit the ability of consumers to copy digital data by requiring manufacturers to embed DRM capabilities into digital content. By the same token, it is also reasonable to disclose exactly the use of DRM Technologies and to limit the erosion of fair-use rights. Copyright Law has exceptions that may be used to safeguard consumers. But to face a shift from copyright to contract law I believe that the traditional and basic consumer’s rights, pillar of the modern consumer movement, could be also adapted and considered for the digital environment. The right to safety, the right to be informed, the right to choose and the right to be heard, must represent the parameters of a new legal framework for distribution of digital content.\(^6\)


\(^6\) These fundamental consumer rights were enshrined in a Consumer’s Bill of Rights in 1962 by US President J.F. Kennedy; and since then, the world consumer movement has added more.
5. Reconciling Intellectual Property Rights with Consumer Protection

Traditionally, it has been recognized that a consumer buyer might require additional form of protection to those offered to a commercial buyer. Consumer protection measures could play a useful role in reconciling the interest of intellectual property rights-holders and users. Unfortunately, the interaction between consumer protection and DRM remain relatively unexplored because of early stage of the investigation among scholars. However, the

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52 See GERAINT HOWELLS & THOMAS WILHELMSSON, EC CONSUMER LAW 3 (1997).

predominant purpose of the directives and other rules issued in the EC consumer law area relate exactly to the protection of the economic interests of consumers.\textsuperscript{54}

As argued above, technological protection measures have a series of upsetting and unexpected uses. For example, most software programs are subject to End User License Agreements (hereinafter EULAs), and the common consumers’ attitude towards EULAs is to agree without reading them.\textsuperscript{55} But a EULA is a classic example of a contract of adhesion that does not come as the result of a negotiation between the vendor and the user.\textsuperscript{56} A mass-market software company writes the EULA to license copies of its goods, so it can restrict their

\begin{flushright}
\textsuperscript{54} See HOWELLS & WILHELMSSON, supra note 52, at 85.
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\textsuperscript{55} For a collection of unfair EULAs see Annalee Newitz, Dangerous Terms: A User Guide to EULAs, at http://www.eff.org/wp/eula.php.
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customers’ rights of transfer and use. Essentially, the only possibility for the end user is to take it or leave it. DRM can be used to enforce EULA clauses or even policies that are not legally enforceable.

Generally, the use of technological protection measures could increase the power of rights-holders to set excessive conditions on the users. The combination of a contract and technological protection measures could represent a powerful mixture for a fully automated system of secure distribution, rights management, monitoring, and payment for protected content. See P. Bernt Hugenholtz, Copyright and Electronic Commerce: An Introduction, in COPYRIGHT AND ELECTRONIC COMMERCE: LEGAL ASPECTS OF ELECTRONIC COPYRIGHT MANAGEMENT 1, 2 (P. Bernt Hugenholtz ed., 2000). So, DRM, de facto, could also be seen as the imposition of “unilateral[] contractual terms and conditions.” As already pointed out, when users access content protected by a technological protection measure, the content

provider, in practice, imposes a contractual provision by a click-through or click-wrap agreement.\footnote{59}

In this sense, “technological protection measures can be considered a condition of the widespread use of contract-based distribution models on the Internet.”\footnote{60} Therefore, the unfairness that these measures introduce in the different positions should be

\footnote{59} Under this legal fiction, the consumer can agree to the terms of contract in a very similar way to the shrink-wrap license. On the latter form of licensing agreement, see Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995). Some commentators argue that, even if “DRM usage contracts are usually made over the Internet and are therefore not shrink-wrap licenses in the strict sense... [they could be] analogized...to their online counterpart: the so-called ‘click-wrap’ licenses.” Bechtold, *supra* note 33, at 343 (remarking also that “[m]ost DRM usage contracts are such click-wrap licenses”). On the electronic contracting environment, see Hillman & Rachlinski, *supra* note 56, at 464 (2002).

considered by policymakers if they want to support this kind of business model.\textsuperscript{61}

Some commentators have reasonably argued that, unless the legislature clarifies the issue, “the copyright regime would succumb to mass-market licenses and technological measures.”\textsuperscript{62} It will be necessary, for example, to reconsider the norms protecting consumers and weak contracting parties, particularly dealing with a contract able to impose unlimited restrictions on the contents. As already done in other similar situations, it is necessary to rebalance the function of copyright law, or rather, to identify the limits of contracts as means of exploiting intellectual property rights.

\textsuperscript{61} For a European perspective on whether copyright limitations and exceptions can be contracted or overridden through contract law or technological protection devices, see Lucie M.C.R. Guibault, \textit{Contracts and Copyright Exemptions}, in \textit{COPYRIGHT AND ELECTRONIC COMMERCE}, supra note 57, at 125, 149-52.

\textsuperscript{62} \textit{Id.} at 160.
5.1 Consumer Privileges under Copyright Law

Normally consumers have some privileges granted under copyright law regime.\textsuperscript{63} Copyright law allows certain exceptions whereby users can use copyright works freely without rights holder authorization.\textsuperscript{64}

Both common law and civil law countries have more or less several exceptions in common such as exceptions for educational and scientific purposes, exception for citation, parody and private copying exception. Generally these exceptions consent to consumers to make copies or utilize copyrighted material in some circumstances.

Problems come out when a technological protection measure is in place because it eliminates these fair use rights or copyright exceptions. Given that the circumvention of these measures is strictly prohibited, the beneficiary of a copyright exception on a technologically protected content would have no possibility to benefit from these exceptions without exposing to sanctions.

\textsuperscript{63} See De Werra, \textit{supra} note 58, at 244.

\textsuperscript{64} See \textit{e.g.} 17 U.S.C. 107 (2000) and, at an international level, the Article 9(2) of the Berne Convention also called “Three-Step Test”, Article 10 and 10bis. See also Consumer’s Guide to DRM, \textit{supra} note 53, at 11.
Thus, the question is whether right-holders are allowed to render ineffective the copyright exemptions by implementing technological measures.

European law does not resolve these problems: the safeguard provided by article 6(4) of the EC Copyright Directive, which deals with the relationship between technological protection measures and copyright exceptions, is vague and difficult for an individual to claim. Furthermore the article stipulates that regulations must come from right-holders and, only subsidiarily, are subject to intervention of the State. It is evident that such disposition may cause a delegation of governmental decision making to a non-governmental entity with

65 “Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by right-holders, including agreements between right-holders and other parties concerned, Member States shall take appropriate measures to ensure that right-holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b), or (3)(e) the means of benefitting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.” See Council Directive 2001/29, art. 6(4), 2001 O.J. (L 167) 17-18 (EC).
a consequent privatization of the government's role in protecting intellectual property.

Only few Member States have implemented effective rules to protect the interest of consumers of digital content.66 Some countries such as Greece and Ireland have implemented the Directive into national law requiring that right holders make available means to beneficiaries to benefit from the exceptions.67 On the contrary, Austrian and Dutch law does not set any exception to the anti-circumvention provisions.


67 See Groeneboom, supra note 66.
Concerning private copying exception, Denmark, for instance, does not mention any provision; UK Copyright Act expressively refers to "time-shifting" as the only private copying exception.\textsuperscript{68} In Italy the Legislative Decree 68/2003, transposing the EC Copyright Directive, authorizes a copy of a digital protected content for personal use only if "the user has obtained legal access to the work and the act neither conflicts with the normal exploitation of the work nor unreasonably prejudices the legitimate interests of the rightholder."\textsuperscript{69} These are just some examples and it is quite unclear

\textsuperscript{68} \textit{Id. See also} Nora Braun, \textit{The Interface Between the Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community}, 25 E\textit{ur. Intell. Prop. Rev.} 496, 501 (2003) (illustrating the different implementation of Art. 6(4) within the European Community); \textit{Concise European Copyright Law}, supra note 66, at 393.

\textsuperscript{69} \textit{See} Decreto Legislativo n. 68/2003, art. 71(4)-sexies, Official Gazette of the Italian Republic No. 87 of April 14, 2003. "Fatto salvo quanto disposto dal comma 3, i titolari dei diritti sono tenuti a consentire che, nonostante l'applicazione delle misure tecnologiche di cui all'articolo 102-quater, la persona fisica che abbia acquisito il possesso legittimo di esemplari dell'opera o del materiale protetto, ovvero vi abbia avuto accesso legittimo, possa effettuare una copia privata, anche solo analogica, per uso personale, a condizione che
how these rules will be applied in practice. In particular if right
holders do not adopt voluntary measures to allow the use of
exceptions, Member States can adopt different policies that vary
widely from country to country.\textsuperscript{70} This is one of the reasons why the
Directive purpose for harmonization seems to have failed.

However, the real problem is that, even in case consumers have
some privileges under national law, copyright exceptions can be
replaced with different conditions in accordance with a contract
between users and content providers.

One of the consequences of the use of technological protection
measures is that any rights that consumers may have under copyright
law could be replaced by a commercial agreement between the
parties with a modifying consequence on the balance of rights.\textsuperscript{71}

\textit{tale possibilità non sia in contrasto con lo sfruttamento normale dell'opera o
degli altri materiali e non arrechi ingiustificato pregiudizio ai titolari dei
diritti.”} For the cited english translation see Groeneboom, \textit{supra} note 66.

\textsuperscript{70} See on this point CONCISE EUROPEAN COPYRIGHT LAW, \textit{supra} note 66 at 392
(commenting the implementation of article 6(4) in the Members States.)

\textsuperscript{71} See ROSENBLATT ET AL., \textit{supra} note 1, at 47. \textit{See also} Consumer’s Guide to
DRM, \textit{supra} note 53, at 11.
5.2 Must Consumers Accept any Digital Terms and Conditions?
In light of the above discussion, it is clear that there is an essential contradiction: if the technological measures against copying are legal, and, at the same time, there is a set of consumers’ legitimate privileges to use content, what kind of solution is possible? The issue is that users are not allowed to eliminate the legal protection to validate these privileges. Even when consumers have the exception to make private copies, technological protection measures can effectively hinder consumers in exercising this “right”\(^{72}\). The legal environment seems to support this adverse practice because rights-holders are not legally obliged to assist a user in exercising his exception of copying for private use. As a consequence, that “right” becomes illusory.\(^{73}\) From a U.S. perspective, court decisions are quite unclear on the point. However it is unambiguous that, at least to my

\(^{72}\) It is not a right in the strict sense of the word.

knowledge, they have just ruled that there is no “generally recognized right to make a copy of a protected work, regardless of its format, for personal noncommercial use”\(^74\). Also European and most national laws do not yet provide a clear answer to the matter.

A possible solution could be to see DRM systems as means to put into effect a contract between the content provider and the end user in a very similar way to “shrink-wrap licenses” for computer software.\(^75\) The issue will be to set the limit on infringement, if it could be identified as a simple contractual infringement concerning civil law of a private nature, or as a criminal offense. It is necessary

\(^74\) See United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1135. See also Recording Industry Ass’n of America, Inc. v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9\(^{th}\) Cir. 1999) (arguing that the private, noncommercial recording of copyrighted musical works using digital technology and the Internet constitutes fair use).

\(^75\) See Bechtold, supra note 33, at 342 (arguing that DRM usage contracts are employed to establish contractual privity between providers and individual consumers in a mass market protecting content not only by technology, but also by contract). On the increasing use of licensing, see The Digital Dilemma, supra note 7, at 34 (2000). But see, contra, Margaret Jane Radin, Regulation by Contract, Regulation by Machine, 160 J. INST. THEORETICAL ECON. 1, 12 (2004) (stating that DRM is a replacement for contract).
to keep in mind the fact that the problem of intellectual property exceeds simple private agreements. It is essential to mention explicitly the contractual obligations of the content user.

Transactions supervised and enforced by technological protection measures in addition to this type of contract could alter the balance of rights between rights-holders and consumers. In particular, in the U.S. systems, some types of technologically-enforced rights transactions supersede the limits of fair use and the first sale doctrine. Nevertheless, DRM, used within a contract, could be used to protect content that is not subject to intellectual property rights protection, and could also erect barriers not only at the entrance level. DRM has also the potential to set up an exit barrier because it


78 See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). In this case the court upheld a shrinkwrap license agreement that would protect the plaintiff's
does not know when copyright terms expire.\textsuperscript{79}

Returning to the initial question: "Must consumers accept any digital terms and condition?" my answer is no. Consumer law stipulates in details the information that must be communicated to consumers. Also in the framework of digital media and DRM technologies, consumer must be informed about the rules associated with the use of the offered digital content. Furthermore some unfair contractual terms can be legally prohibited if they cause a significant imbalance in the parties’ rights. In both cases a Court could consider the conduct of the contracting parties and, if necessary, the contract

\[\text{CD-ROMs of telephone listings from being posted on the Internet although the Supreme Court had said that this kind of material could not be protected by copyright. See Feist Publ’ns, Inc. v. Rural Tel. Servs. Co, 499 U.S. 340 (1991). On the argument and for examples of contractual terms that conflict with copyright law, see Mark A. Lemley, Beyond Preemption: The Law and Policy of Intellectual Property Licensing, 87 CAL. L. REV. 111, 125-26, 132 (1999). See also Elkin-Koren, supra note 76.}\]

\textsuperscript{79} DRM systems exercise the same control on works that should exit copyright, hampering their entry into the public domain and establishing a \textit{de facto} unending copyright protection. See John R. Therien, Exorcising the Specter of a “Pay-Per-Use” Society: Toward Preserving Fair Use and the Public Domain in the Digital Age, 16 BERKELEY TECH. L.J. 979, 994 (2001).
could be considered not binding for the consumer. However, the eventual court decision is most of the times, useless, as far as it comes after several years of litigation, when the product has been for much time in the market, and even more, superseded by a new and more updated product.

In the following paragraphs I will analyze the European and American scenarios considering some legal instruments for the protection of the weak contractual party in digital media transactions.


What we see in the contractual structure of DRM is something similar to a standard form contract, already popular in commercial and consumer transactions, and particularly diffused in technological transfers, licensing intellectual property, and service agreements.80 It is rather unquestionable that DRM systems and technological protection measures are frequently used to enforce standard contract terms. I believe that the current consumer protection law can offer the correct instrument to national authorities to mediate in disputes

over unfair consumer contract, in particular when DRM systems are involved and their use is misrepresented or not disclosed to consumers.

In the following pages, I take in consideration the European and the U.S. provisions, confronting the U.S. state law doctrine of unconscionability, European consumer protection law81 and other traditional limitations on contractual rights.82

6.1 U.S. Approach Towards Digital Terms and Conditions

standard form agreements and has enforced their terms.\footnote{For an overview of standard terms in American law, see Edward Allan Farnsworth, Contracts (4th ed. 2004).} Furthermore, information disclosure has been the main focal point of American consumer protection legislation for most of the twentieth century.\footnote{See Rubin, supra note 43, at 35; Stephen Bainbridge, Mandatory Disclosure: A Behavioral Analysis, 68 U. Cin. L. Rev. 1023 (2000); Thomas A. Durkin & Gregory Elliehausen, Disclosure as a Consumer Protection, in The Impact of Public Policy on Consumer Credit 109, 110 (Thomas A. Durkin & Michael E. Staten, eds., 2002).}

Federal and state legislatures have enacted statutes to protect the consumer against aggressive contracting, unfair practices and his own ignorance in certain transactions.\footnote{See Burke, supra note 56. See also Robert L. Oakley, Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts, 42 Hous. L. Rev. 1041, 1061 (2005) (arguing that the United States does not have a general law governing unfair contract terms with any specificity).} These competences are shared with the Federal Trade Commission, a law enforcement agency charged by Congress to protect the public against deceptive
or unfair practices and anticompetitive behaviour. The most important instrument of the Federal Trade Commission in order to apply and to enforce the standard of fairness has been its rule making authority, even if the recent inclination is to prefer administrative action, seen as more flexible and efficient. The rulemaking procedures, the administrative actions, the injunctions and other mechanisms to obtain consumer compensation are all potential effective instruments to protect also digital consumers from unfair or deceptive practices.

On this matter the “doctrine of unconscionability” has the effect

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87 MICKLITZ & KESSLER, supra note 86, at 424, 433.

88 Codified in UCC § 2-302 (1978). It is found also in general contract law: see Restatement 2d of Contracts, § 208. For more regarding unconscionability, see Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. PA. L. REV. 485, 505 (1967) (coining the terms "procedural" and "substantive" unconscionability); Richard Craswell, Property Rules and Liability Rules in Unconscionability and Related Doctrines, 60 U. CHI. L. REV.
of extending the protection of weak contractual parties as far as possible, \(^8\) giving judges the power to determine boundaries of this remedy. \(^9\) This doctrine provides a way for courts to control unfair

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89 See David W. Slawson, Binding Promises: The Late 20th Century Reformation of Contract Law 57 (1996) (describing the doctrine's introduction in the 1960s and subsequent adoption). See also Hillman & Rachlinski, supra note 56, at 456 (noting that unconscionability doctrine “affords courts considerable discretion to strike unfair terms directly rather than covertly by stretching less-applicable rules in order to reach a fair result”).

contracts and contract conditions. It allows a court to prevent the enforcement of a contract, or specific provisions, if the judge finds that the contract or any part of the agreement to have been unconscionable. The problem with unconscionability as a legal doctrine comes in determining the meaning of the unconscionability. The U.C.C., in fact, does not define it. Courts have described it as “an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party”.91 However, Courts have demonstrated a reluctance to find unconscionability in standard commercial transactions92 but, it is

unenforceable when is demonstrated the occurrence of both procedural and substantive unfairness. See BLACK’S LAW DICTIONARY 1524 (6th ed. 1990).

For the distinction of these two kinds of unconscionability, see Leff, supra note 88, at 487-88.


Unconscionability has been recognized also as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them. See Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 472 S.E.2d 242, 245 (S.C. 1996).

92  See JAMES J. WHITE & ROBERT S. SUMMERS., HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 474 (2d ed. 1980) 474 ("findings of
indubitable that this institution may be able “to enlarge the spectrum of protection available to the consumer, being an incisive and effective legal instrument against unequal bargaining, and abuse of superior contractual position”. Nevertheless, in the opinion of the majority, unconscionability does not seem well standardized to the goal of mitigating the insidious effects of form contracts and copyright licensing practices. Most often the unconscionability is

unconscionability should be rare in commercial settings”); see also Sandra J. Levin, Examining Restraints on Freedom to Contract as an Approach to Purchaser Dissatisfaction in the Computer Industry, 74 CAL. L. REV. 2101, 2108 (1986) (asserting that "courts have exhibited a reluctance to find unconscionability in standard commercial transactions”); Lewis A. Kornhauser, Unconscionability in Standard Forms, 64 CAL. L. REV. 1151, 1153-57 (1976).

93 See Cicoria, supra note 90, at 7.

94 See, for example, Korobkin, supra note 85, at 1208, 1256. See also GUIBAULT, supra note 39, at 262 (arguing that the assessment of the fairness of a licence term under the doctrine of unconscionability takes no account of copyright policy issues and revolves only around matters of contract law and market inquiry); J.H. Reichman & Jonathan A. Franklin, Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information, 147 U. PA. L. REV. 875, 927-929 (1999) (perceiving its inability to respond to intellectual property rights issues and proposing a doctrine of “public interest unconscionability”).
only applied by defendants as a defense to suits and the lack of litigation could suggest the difficulty in proving unconscionability in court by individual consumers.\textsuperscript{95}

Contract law also offers guaranties and protection from potentially unfair clauses in standard form contracts.\textsuperscript{96} Particularly, in the case of standardized agreements, the rule of the section 208 of the Restatement (second) of contracts permits the court to pass directly on the unconscionability of the contract or clause rather than to avoid unconscionable results by interpretation.\textsuperscript{97} Furthermore, the section

\textsuperscript{95} See Fred H. Miller & John D. Lackey, THE ABCS OF THE UCC: RELATED AND SUPPLEMENTARY CONSUMER LAW, 109 (2nd ed. 2004) (observing that for this reason also statutes that permit administrative enforcement are important for consumer protection).

\textsuperscript{96} Restatement 2d of Contracts, § 208. See generally John E. Murray, Jr., The Standardized Agreement Phenomena in the Restatement (Second) of Contracts, 67 CORNELL L. REV. 735, 762-79 (1982); see also Hillman and Rachlinski, supra note 56, at 454-63 (investigating the three main doctrines American courts use to review potential abuses in standard-form contracts: unconscionability, Restatement (second) of contracts, section 211(3) and the doctrine of reasonable expectations).

\textsuperscript{97} See Restatement 2d of Contracts, § 208 cmt. a.
211 of Restatement (Second) of Contracts\textsuperscript{98} sets out a standard that, though not frequently applied,\textsuperscript{99} \textit{de facto} overlaps with unconscionability doctrine, but does so in different terms and under different language.\textsuperscript{100} The effects of the restatement\textsuperscript{101} are summarized

\textsuperscript{98} \textit{Id.} § 211.

\textsuperscript{99} Only forty-three published judicial opinions had interpreted Section 211(3) of the Restatement, twenty-five of those were penned by Arizona courts, and most of those dealt with insurance coverage disputes. \textit{See} James J. White, \textit{Form Contracts under Revised Article 2}, 75 WASH U. L. Q 315, 324-25 (1997).


\textsuperscript{101} Section 211 reads as follows:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
as follows: “a person who manifests assent to a standard form is bound by the terms of that form, except with respect to terms that the party proposing the form has reason to believe would cause the other party to reject the writing if it knew that the egregious term were present”.102

This standard can offer an additional basis for avoiding some

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard term of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

The provision is explained in the comments to the section:

Reason to believe [that a term would have been refused had the other party known of it] may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact the it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view.

This rule is closely related to the policy against unconscionable terms and the rule of interpretation against the draftsman.

Id. § 211 cmt. f.

102 See Nimmer, supra note 100, at 874.
terms in standardized agreements, in particular in front of some unclear and surreptitiously undiscovered contract terms connected with the use of a technological protection measure.103

Some U.S. courts have ruled that form terms unknown to the consumer are unenforceable if the consumer is uninformed of even the existence of terms and this unawareness is reasonable.104 The doctrinal explanation is that contract terms must be “reasonably communicated” to be legally binding and that this requisite is not achieved when the consumer has no reason to know of the presence of such terms.105 An opening in this direction can be read in the


104 See Korobkin, supra note 88, at 1268.

105 See Ciro Silvestri v Italia Società Per Azioni Di Navigazione, 388 F2d 11 (2d Cir 1968) (establishing that terms must be "reasonably communicated" to purchasers).
proposed bill, Digital Media Consumers' Rights Act.\textsuperscript{106} This is a quite recent U.S. legislative answer to the problem of misrepresentation and nondisclosure of information related to copy protected digital media. The Rep. Rick Boucher's proposed bill attempts to restore the historical balance in copyright law and ensures the proper labeling of “copy-protected compact discs”. It requires labels on copy-protected compact discs and attempts to rebalance the legal use of digital content and scientific research prevented by the Digital Millennium Copyright Act. In particular, the main aim of the bill is to ensure that consumers are fully aware of the limitations and restrictions they may discover when purchasing copy-protected digital media because manufacturers are not currently obligated to place these kinds of notices on packaging. Most consumers are not aware of what media stores and file formats they will be limited to when they make the initial decision to buy a portable device even if it is probably written in the End User License Agreement.\textsuperscript{107}.


\textsuperscript{107} See Digital Media Consumers' Rights Act Official summary at http://www.house.gov/boucher/docs/dmcrahandout.htm; Michael P. Matesky, \textit{The Digital Millennium Copyright Act and Non-Infringing Use: Can}
The overall impression is that the American rules of contract formation limit rescission of an otherwise valid contract to a very limited number of cases and with an underreaction.\textsuperscript{108}

Despite these impressions, however, I do agree with who has observed that the structure of general policing doctrines in the U.C.C. and the common law of contract – including unconscionability, reasonable expectations, contract against public policy – can be used to address additional unfair practice and terms that have not yet appeared or not yet identified as problematic.\textsuperscript{109}

\section*{6.2 European Approach Towards Digital Terms and Conditions}

The EC framework is based on a set of rules primarily incorporated in the European Community Council Directive on


Unfair Terms in Consumer Contracts.\textsuperscript{110} It is considered one of the most important consumer contract law directives, formulating a

European concept of unfairness. In addition, further EC legislation, which does not have consumer protection as its primary purpose, offers some consumer protection or regulates the power of national authorities to introduce consumer protection regulations. For example, the Electronic Commerce Directive covers advertising and marketing to consumers by information society service providers. The Television Without Frontiers Directive also coordinates certain aspects of commercial communications through broadcasting means. Moreover, the Brussels Convention and the Rome Convention

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111 See HOWELLS & WILHELMSSON, supra note 52, at 88.


establish rules, in cases of a cross-border contractual dispute within the EC, to determine which Member State Court should hear the case and which Member State’s law will apply to the contract.117

Within the E.C. the general information duties and information duties specifically addressed to consumer are considered an

116 Convention on the Law Applicable to Contractual Obligations 80/934/EEC [Rome Convention] 1980 O.J. (L266) 1. In Europe, the Rome Convention is the principal instrument by which consumer applicable law issues are determined.

117 The general rule, set out in Article 3.1 of the Rome Convention, stipulates that: “A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty…” At the same time, Article 5 of the Convention provides for an exception for contracts involving consumers and for which the subject "is the supply of [tangible] goods or services". For contracts involving consumers, in fact, the law preferred by the parties should not adversely affect the mandatory provisions of the State in which the consumer is habitually resident. The application of this rule is questionable in the case of intellectual property licensing agreements. In fact, the convention fails to deal expressly with issues of jurisdiction and choice of law for copyright infringement cases. See Raquel Xalabarder, Copyright: choice of law and jurisdiction in the digital age, 8 ANN. SURV. INT’L & COMP. L. 79, 80 (2002).
important part of the consumer protection policy. Information is regarded as the basis for the consumers’ freedom of choice.\textsuperscript{118}

Concerning the Unfair Term Directive, it invalidates standardized terms that are unfair and result in a significant imbalance of obligations between the parties to the detriment of the consumer.\textsuperscript{119} Specifically, a term is considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of consumers.\textsuperscript{120} The Directive also contains a non-exclusive grey list of unfair terms.\textsuperscript{121} It sets only a minimum baseline, while every EC Member State has national consumer legislation that protects consumers who adhere to standardized conditions. The Commission


\textsuperscript{119} The Directive applies only to consumer transactions, i.e. those involving an individual who acquires products for her own personal consumption and not for business or professional use. See Howells & Wilhelmsson, supra note 52, at 88-95.

\textsuperscript{120} Council Directive 93/13/EEC, art. 3(1).

\textsuperscript{121} Council Directive 93/13/EEC, art. 3(3).
has stated that “general contractual terms and conditions aim to replace the legal solutions drawn up by the legislator and at the same time to replace the legal rules in force in the Community by unilaterally designed solutions with a view to maximizing the particular interests of one of the parties.”

This Directive offers some level of protection only to consumer defined in the Regulations as “any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession”. A term included in a standard form contract could be presumed unfair if it produces a “significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer”. Comparing the regulation of unfair contract terms and the concept related to the unconscionability doctrine under U.S. contract law, we can consider that the European regulation defines a much lower limit for

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124 See Guibault, supra note 39, at 254.
intervention by courts.125

Also the Distance Contract Directive126 and the Electronic Commerce Directive127 could be applied to products and services offered through on-line contracting and that may include a DRM system.128 Both Directives include transparency provisions that oblige the provider to comply with the requirements relating to the such information about the main characteristics of the goods or services,

125 See Jane K. Winn and Brian H. Bix, Diverging Perspectives on Electronic Contracting in the U.S. and the EU, 54 CLEV. ST. L. REV. 175, 186 (2006) (finding a much lower threshold for intervention by courts also with reference to federal and state regulation of unfair and deceptive trade practices).


the prices, the right of withdrawal, the contract terms and the general conditions. In particular the Distance Contract Directive grants consumers the right to withdraw from certain contracts with a supplier when the contract formation takes place without physical presence of contractual parties.\textsuperscript{129}

In this type of contract, the consumer must receive written confirmation or confirmation in another durable medium, such as electronic mail, at the time of performance of the contract. Supplier is obliged to inform consumer in writing about: arrangements for exercising the right of withdrawal; place to which the consumer may address complaints; information relating to after-sales service; conditions under which the contract may be rescinded.\textsuperscript{130} The Electronic Commerce Directive introduces legal certainty by requiring the exchange of certain information in connection with the

\textsuperscript{129} Council Directive 97/7/EC, art. 6.1.

\textsuperscript{130} To comply with this regulation, some European music stores have already granted customers the right to return downloaded digital music within seven days. \textit{See} Urs Gasser, \textit{iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media – A Case Study} 21 (Berkman Ctr. for Internet & Soc’y at Harvard Law School Research Publ’n No. 7, 2004), http://ssrn.com/abstract=556802.
conclusion of such contracts, in particular it requires on-line suppliers to inform consumers about the name, geographic and electronic address of the provider of the service,\footnote{Council Directive 2000/31/EC, art. 5.1.} a clear and unambiguous indication of the price,\footnote{Id. at art. 5.2.} indication on any relevant codes of conduct and information on how those codes can be consulted electronically\footnote{Id. at art. 10.2.} and, finally, the contract terms and general conditions provided to the recipient available in a way that allows him to store and reproduce them. Although these Directives do not expressly deal with copyright licenses, scholars suggest the possibility to extend these regulations to goods and services offered through click-wrap licenses over the Internet.\footnote{See Guibault, supra note 39, at 302-304; Gasser, supra note 130, at 21-22.}

Recently, the EC consumer protection regulatory framework has been enriched with a new directive on Unfair Commercial Practices\footnote{Directive 2005/29/EC of the European Parliament and of the Council on Unfair Commercial Practices, 2005 O.J. (L149) 22. For first comments see Hugh} concerning unfair business-to-consumer commercial...
practices in the internal market. This new Directive concerns business-to-consumer transactions whereby the consumer is influenced by an unfair commercial practice which affects decisions on purchasing or not a product, on the freedom of choice in the event of purchase and on decisions about exercising a contractual right. By harmonizing the legislation in this field, it provides a general criterion for determining if a commercial practice is unfair, in order to establish a limited range of unfair practices prohibited throughout the Community. In particular, the principle used to determine whether a practice is unfair, is the “materially distortion of the economic behaviour of consumers”\(^\text{136}\). This criterion refers to the use of a commercial practice that appreciably impairs the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.\(^\text{137}\) There is no doubt that the Directive could constitute a new starting point in setting some protection standards regarding

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\(^{136}\) Directive 2005/29/EC, art. 2(e).

\(^{137}\) \textit{Id.}
digital media transactions in the European electronic marketplace.\textsuperscript{138} It has been observed that the failure “to inform consumers about the application on a digital support of an anti-copy device, which prevents them from making any copy for time- or place shifting purposes, could amount to a misleading practice that would be prohibited”\textsuperscript{139} under this Directive.

7. Interoperability & Standards as an Indirect Form of Consumer Protection

Another different approach in the regulatory framework for consumer protection in digital media world has been proposed by Professor Jane Winn in a recent academic work.\textsuperscript{140} She asserts that, “because technological standards constitute a form of regulation that shapes markets and market behavior”, regulators and policy makers might also be able “to protect consumer interests in on-line markets by focusing on the content of the technical standards that define the

\textsuperscript{138} See generally CRISTINA COTEANU, CYBER CONSUMER LAW AND UNFAIR TRADING PRACTICE (2005).

\textsuperscript{139} Guibault & Helberger, supra note 128, at 15.

architecture of on-line markets”. Standards have for long been recognized as the natural means to enable the emergence of networked systems and platforms. It would be desirable that these discussions be complemented with concrete proposals on how global market can benefit from new paradigms of innovation and merge this with adequate intellectual property rights policy. Technical standards are, in fact, considered one of the foundations of the modern consumer movement, as well as one of the most interesting and innovative forms of consumer protection. Governments should

141 Id.

intervene in the development of information technology standards because they could be an effective vehicle to protect consumer interests.

Standardized data formats and interoperability offer advantages for technology consumers as well as for the companies that develop them\textsuperscript{143}. Accordingly, some economists argue that:

Consumers generally welcome standards: they are spared having to pick a winner and face the risk of being stranded. They can enjoy the greatest network externalities in a single network or in networks that seamlessly interconnect. They can mix and match components to suit their tastes. And they are far less likely to become locked into a single vendor, unless a strong leader retains control over the technology or wrests control in the future through proprietary extensions or intellectual property rights.\textsuperscript{144}

It has been demonstrated that content industry has been able to reach agreements on the adoption of technological protection measures for special format. The case of DVD is the most evident example.

\begin{footnotesize}
\begin{itemize}
\item \textbf{Standardization of Consumers' Goods; An Aid to Consumer-Buying} (1932).
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On this front, it has been observed that the EC “seems to have missed an opportunity to use information technology standards to enhance compliance with its very broad data protection laws” while “the U.S. appears to be moving in the direction of using management standards to strengthen the enforcement of some of its much narrower information privacy laws.”\footnote{See Winn, \textit{supra} note 142.} The EC Copyright Directive avoids, in fact, the requirement of any particular standard yet encourages the compatibility and interoperability of different systems.\footnote{See Marie-Thérèse Huppertz, \textit{The Point of View of Software Industry}, in \textit{The Future of Intellectual Property in the Global Market of the Information Society: Who is Going to Shape the IPR System in the New Millennium?} 70 (Frank Gotzen ed., 2003).} However, even if from a consumer perspective the goal could be the development and diffusion of a global standard, the content industry is worried that a standardized management system could be more vulnerable to piracy.

If we accept all these patterns as a starting point for a reasonable solution of the conflict between the two opposing rights, we can probably find a way to reduce intellectual property disputes over digital content, different from the difficult legislative options.
Therefore, we have to decide if we want all content rights transactions to fall under contract instead of copyright law, and, if so, we have to find remedies to protect the consumer’s rights. “Consumer contracts governing the use of digital material,” need to be “fair and transparent.”\textsuperscript{147} and, probably, the application of consumer protection law could immediately offer an effective solution to reduce imbalance between parties. To ensure consumers to continue engaging in fair uses, it is necessary to circumvent technological restriction when legitimate purposes require it. Consumers must acquire and keep these legal mechanisms in order to avoid abuses.

8. Final Remarks

This article examined DRM systems, their ability to manage copyright, the intersection of copyright with contract, the limitation of legitimate user rights, what to do about this problem and additionally providing a discussion of both consumer law in Europe and the U.S.

In a framework where contract law is replacing intellectual property law, I have looked the difficulties and the possible solutions

\textsuperscript{147} DRM-BEUC Position Paper, supra note 73, at 3.
of maintaining a balance between the inherently contradictory interests of intellectual property rights-holders and the general public. In particular, I have explored the ways in which consumer protection law can safeguard consumer’s use of DRM protected digital content. On this point the European Union law\textsuperscript{148} includes special rules for specific types of contracts while the U.S. legal system seems to link consumer protection to market mechanism treating the problem in a more general way.\textsuperscript{149}

Perhaps the most clearly defined result which has emerged from this investigation is that the law currently governing transaction in digital content was not, for the most part, designed specifically for this purpose.\textsuperscript{150} Reform is needed, and it is needed now.

With regard to possible positive actions at European level, it could be necessary to take advantage of the forthcoming review of the

\textsuperscript{148} Consumer protection has also received a significant place in the Community’s constitution. See Treaty establishing a Constitution for Europe, Article III-235, 2004 O.J. (C 310) 1, 105.

\textsuperscript{149} See Winn & Bix, supra note 125, at 190. Sometimes, it might be right after all. Markets could be much efficient and fast than government institutions at tailoring well-balanced solutions.

\textsuperscript{150} See Braucher, supra note 109, at 176.
European regulatory framework for consumer protection and the recast of the intellectual property *acquis*. As correctly observed by consumers’ organizations, the review must be “not merely retrospective but also prospective in assessing how the *acquis* can adapt to changes in the market place”.151 In particular, it is indispensable to evaluate how the *acquis*, “and more fundamental consumer rights underlying the *acquis*, can be applied effectively” also in the digital environment152 stipulating new rules for the implementation of the digital consumer protection.153 As it was proposed by the Bureau Européen des Unions de Consommateurs, it is indispensable to include a provision on DRM technologies in the unfair contract directive. The implementation of this proposal would allow the consumer protection authorities to intervene against unfair

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151 See BEUC Memorandum, *supra* note 37, at 8.

152 *Id.*

consumer contract terms if the terms are “code-based” rather than “contract-based”.154

For resolving the problem of a safe distribution and use of electronic works we can lay down two different paths.

The first scenario assumed that the status quo will be maintained. In this case policy makers will have to reexamine and adjust the regulatory and enforcement copyright policies so as to correct the actual imbalance. In particular they will have to decide if consumer protection could be better safeguarded inside or outside copyright law.

The second, and more unrealistic, scenario involves the best alternative for a consumer, which is a situation where content providers decide to abolish DRM technologies. But, an open environment, free from DRM limitations seems much more a provocation rather than as a serious argument.155


155 See Jobs, *supra* note 50.
This is the reason why, as long as circumstances remain the same, I believe that consumer protection law could effectively contribute, even if only partially, to provide information disclosure, protection and transparency in relation to transaction done by means of electronic instruments and involving DRM technologies.\textsuperscript{156} The duty to correctly inform consumers about DRMs can contribute to re-establish consumer confidence in digital media, recalibrating the balance of intellectual property rights in digital content transactions. Consumer, in fact, must benefit from technological innovations without abusive restrictions; in particular technology should not be surreptitiously used to erode established consumer rights.

Consumer protection law may not be the panacea for the management of digital rights, but could contribute - awaiting for new rules - to pave the way for a fairer play in the markets, maintaining alive consumer rights also in the digital environment.

\textsuperscript{156} Cf. Helberger, \textit{supra} note 153 (asserting that neither copyright law nor general consumer protection law currently offers a common, comprehensive protection standard for users of electronically protected content.)